No. 2017.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR VON ARX,

Plaintiff in Error,

vs.

A. J. BOONE,

Defendant in Error.

Petition of Plaintiff in Error for a Rehearing

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

J. H. COBB,
Attorney for Plaintiff in Error.

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PETITION FOR REHEARING

After a careful examination of the opinion of this Honorable Court in this case, we have concluded to ask for a rehearing. We believe we may with perfect propriety do this in view of the fact that the point we wish to emphasize was not exhaustively presented in the brief, and seems to have been overlooked, at least as to its full force and effect, in the opinion. And if this is the case, and the Court has thereby been misled, or inadvertently fallen into error, we are satisfied Your Honors would be unwilling to spare any labor and pains to correct such error in the conclusions reached.

Your Honors have thus tersely and correctly stated the position of the plaintiff:

> "As the plaintiff could recover in ejectment only upon proof of title or right of possession in

him, it was incumbent upon him to show not only that he received a conveyance from Smallwood, but that at the date of such conveyance, Smallwood's interest in the property had not been divested by the decree of foreclosure rendered against him on December 8, 1908, and the proceedings following thereupon."

The Court then proceeds to dispose of the plaintiff's contention that the decree of December 8, 1908, was void; and of this portion of the opinion we do not ask a reconsideration. The Court then said:

"We are not called upon to decide whether Erhlich had the right to redeem the property after the sale to Meyer, or what may have been the effect of the redemption. By the foreclosure sale Smallwood's interest was sold to Meyer, and if there was no valid redemption, the certificate of purchase which Meyer received from the marshal was sufficient evidence in the action of ejectment, to show that Smallwood had been divested of his interest."

The decision of the case, then, upon this branch of the controversy, rests upon the proposition that Smallwood's title had been divested out of him by the decree and proceedings under it, at the date of the conveyance to the plaintiff. If this be true, then we most respectfully submit that the Court must have overlooked the theory of the defense as made by the pleadings, and certain facts appearing in the evidence, and certain legal principles applicable thereto. For convenience and clearness we will briefly restate these matters:

1st. The defendant plead the deeds from the marshal

to Erhlich dated March 10th, 1910. (Rec. 5.) These deeds are in the record pages 39 to 46, and show that on March 2, 1910, the amount of the bids for the property under the sale theretofore had, was repaid by Erhlich, and a certificate of redemption given to him. They further show that the redemptionees were Meyer and *the defendant A. J. Boone.* Plaintiff in his reply admitted this, but denied only that Erhlich thereby obtained the title of Smallwood. (Rec. 9.) *Thus the case proceeded upon the theory that the title acquired by the sale under which Meyer and Slane (defendant's assignor) bought had been terminated by the redemption therefrom. It was an admitted fact in the case that the certificate of purchase from the marshal to Meyer was functus officio and never became merged or ripened into title.*

2nd. It is shown by the evidence, and is conceded, that on December 8, 1908, at the date of the rendition of the decree in cause No. 667A, the title, or right of possession of the property in controversy, was in Smallwood.

3rd. That decree as against Smallwood is one *in rem* only, and does not purport to be a judgment *in personam* against him.

4th. At the sale under the order of sale issued against the property, Meyer became the purchaser of a portion thereof, and one L. A. Slane of the balance, and Slane subsequently assigned his certificate of purchase to the defendant Boone. (Rec. 39-46.)

5th. On March 2, 1909, and within 12 months of the confirmation of the sale, Erhlich paid the amount

of the purchase money with interest, for Meyer and Boone, and Boone pleads and relies upon this redemption.

6th. At that time Erhlich was the agent and attorney-in-fact for Smallwood, but had no other interest whatever in the property. (Rec. 23-25.)

7th. The marshal executed deeds to Erhlich to Smallwood's property. (Rec. 39-46.)

8th. Thereafter, upon execution against Erhlich alone, the property was sold as the property of Erhlich, and bid in by the defendant Boone. (Rec. 53-4.)

9th. Thereafter Smallwood, by his agent Erhlich, sold and conveyed to the plaintiff. (Rec. 27-8.)

Upon the above stated pleadings and facts, it was contended by the defendant that while the sale to Meyer and Slane was terminated by the redemption, yet the title did not revert to, or remain in Smallwood, but by virtue of the marshal's deeds Smallwood's title passed directly to Erhlich, and thence by execution sale against Erhlich to the defendant.

The plaintiff contended that the effect of the redemption was to put an end to the sale, and the title remained in Smallwood, and was by him conveyed to the plaintiff.

Your Honors held this issue to be immaterial in as much as the marshal's certificate to Meyer *after redemption,* was sufficient evidence that Smallwood had been divested of title at the time of his conveyance to the plaintiff. And we earnestly ask your Honors to re-examine this holding in the light of the following authorities:

First: When Meyer and Slane (Boone) bid in the property at the foreclosure sale, they did not thereby obtain the title of Smallwood. A successful bidder at such sale only obtains the right of possession and a right to a deed and the title at the termination of the period of redemption, *if there is no redemption.* In the meantime the title remains in the defendant in execution subject only to be divested out of him by the execution of the marshal's deed if there is no redemption.

Cartwright vs. *Savage,* 5 Or. 398.

In that case the Court, speaking of the successful bidder at sheriff's sale, said:

> "He has no absolute legal right in and to the premises until the confirmation of the sale and the execution of a deed by the sheriff. It is well settled that if redemption be consummated, the effect of the sale is terminated, and the property is restored to its original condition."

To the same effect is,

Dray vs. *Dray,* 21 Or. 59;
Settlemire vs. *Newsome,* 10 Or. 446;
Kaston vs. *Storey,* 80 Pac. Rep.. 217;
Williams vs. *Wilson,* 70 Pac. Rep. 1031.

Second: Erhlich, being neither a judgment creditor, nor defendant in execution, had no right of redemption. But when he paid the redemption money to redeem, and this attempted redemption was acquiesced in by Meyer and Boone, they lost all interest in the property, and were estopped to say there was no

redemption. Acquiescence by the purchaser in a redemption by one having no legal right to redeem, terminates the effect of the sale as fully as a legal redemption would have done, and has the same effect, viz.: *"the property is restored to its original condition."*

> II Freeman on Ex., 2nd ed., sec. 314a;
> *Borders* vs. *Murphy,* 78 Ill. 81;
> *Clingman* vs. *Hopkie,* 78 Ill. 152;
> *Meyer* vs. *Montonye,* 106 Ill. 414;
> *Brooks* vs. *Sanders,* 110 Ill. 453;
> *Smith* vs. *Mace,* 137 Ill. 68, S. C. 26 N. E. Rep. 1092.

In *Smith* vs. *Mace* the Supreme Court of Illinois, citing the four preceding cases, said:

> "The doctrine of these decisions is simply this: A party accepting money as a redemption of property from a sale is thereafter estopped from saying that the property is not redeemed. Being redeemed from the sale, the property is no longer incumbered by it, *and it ceases to be an element in the title to the property.* Redemption by junior judgment creditors are purely statutory, *and no one can obtain rights in that way, save by bringing himself within the spirit of the statute.* These parties having failed to do so, they could assert no claim to the property, *and the defendants were therefore left with their property just as if these liens had never existed."* (Italics ours.)

In the case at bar, the defendant, one of the redemptionees, pleads and relies upon the redemption by Erhlich. Yet if the authorities above quoted are good law, when Erhlich redeemed he acquired no

right to the property as against Smallwood, because he was not "within the spirit of the statute" conferring the right of redemption. But the defendant is estopped to deny that the property was redeemed, and "restored to its original condition." The sale to Meyer then, which your Honors held to be conclusive against plaintiff, *"ceased to be an element in the title to the property."* Erhlich did not and could not obtain any right in and to the property by the redemption, because he had no right of redemption, but the redemption nevertheless, having put an end to the sale, the title remained in Smallwood, and of course the defendant got nothing by his purchase under the personal judgment against Erhlich, for Erhlich had nothing to sell. The marshal's deeds were void for lack of legal power to execute them. Such deeds must be made to the purchaser or his assignee, and not to a volunteer.

This reasoning, and the conclusions reached, appears to us to be inevitably correct in the light of the adjudged cases; and if it is, then it necessarily follows that this Court was in error in holding that it "was " not called upon to decide whether Erhlich had the " right to redeem the property"; and was also in error in holding that "the certificate of purchase which " Meyer received from the marshal was sufficient evi- " dence in the action of ejectment to show that Small- " wood had been divested of his interest." That would have been the case, undoubtedly, if the effect of the sale and the certificate had not been put an end to by the redemption. But manifestly the purchaser can-

not have his money back and the property too. These matters the Court appears to have overlooked, and we think that a proper consideration of them will lead to the conclusion that the case ought to have been differently decided.

Third: There is another aspect of the case to which we most respectfully call the Court's attention. At all the times mentioned in the pleadings Erhlich was the agent of Smallwood. He could acquire no rights in the property adverse to Smallwood or his vendee. The payment of the redemption money by Erhlich was in law the payment by Smallwood.

> 1 Am. & Eng. Ency. of Law, 2nd ed., 1082-1085, and cases cited.

This is the rule even if Erhlich were claiming the property as against Smallwood or his vendee. But the facts lead irresistibly to the conclusion that Erhlich was in fact as well as in law making the redemption for Smallwood; for he thereafter as agent of Smallwood sold and conveyed the property as the property of Smallwood. The execution of the so-called marshal's deeds to Erhlich was simply the marshal's or somebody's blunder. His only power, and his official duty, was to have issued a certificate of redemption to Smallwood, the only person who had the right of redemption. But certainly Smallwood cannot lose his property because the marshal did an unauthorized act, whether that act was the result of a blunder or not.

Believing that a mistake has been made, and a consequent injustice done the plaintiff in error, we most

earnestly beg that Your Honors will grant a rehearing upon the questions raised.

Respectfully submitted,

J. H. COBB,
Attorney for Plaintiff in Error.

I, J. H. Cobb, counsel for Plaintiff in Error, do hereby certify that in my judgment the foregoing petition is well founded and is not interposed for delay.

J. H. COBB,
Counsel for Plaintiff in Error.

Service of the above and foregoing motion admitted this March 13, 1912.

Z. R. CHENEY,
Attorney for Defendant in Error.